



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Richard Doyle  
City Attorney

**SUBJECT:** SINGLE-USE CARRYOUT BAG

**DATE:** December 2, 2010

## INTRODUCTION

On December 14, 2010, the City Council will consider a proposed ordinance to ban single-use carryout bags, and require a minimum store charge for the sale of recycled paper bags. The minimum price of twenty-five cents (25¢) is proposed but would be deferred for the first two years in favor of a reduced charge of ten cents (10¢). Proceeds from the sale are retained by the retailer without any limitations on the use of these funds. Customers can avoid purchasing a carryout paper bag by bringing in their own reusable bag. This memorandum briefly discusses the basis for the City's ability to promote the general welfare through economic regulation.

## ANALYSIS

### Minimum Pricing – Not a Tax nor a Fee

The City, pursuant to its taxing power, can seek majority vote of the electorate to pass a "general tax" to raise revenue for general governmental purposes, or a "special tax" for specific purposes with approval from two-thirds of the electorate. Alternatively, the City may exercise its police powers to adopt a fee to pay for regulatory programs that address problems of public health, safety, and welfare. These fees, known as regulatory fees, are imposed on the individual or entity whose behavior is the source of the harm being regulated, or who receives a direct and distinct benefit.

On November 2, 2010, the voters approved Proposition 26, which redefined any levy, charge, or exaction as a tax, unless expressly within certain exceptions. According to the findings and declaration of purpose, the purpose of Proposition 26 is to limit the Legislature and local government from adopting "new taxes as 'fees' in order to extract even more revenue from California taxpayers." Moreover, the paragraph in the initiative, which discusses the burden of proving when a levy, charge, or other exaction is not a tax, refers to the amounts raised in the context of funding a governmental activity. A more detailed analysis of the impact of Proposition 26 was recently issued to the City Council.

In this instance, the minimum charge for the sale of recycled paper bags is neither a tax nor a regulatory fee impacted by Proposition 26 because it does not **result in revenue**

**to the state or local government** to pay for the cost of public programs or projects necessary to regulate the activity of the business or person. Rather, like the sale of any other product, the retail establishment retains the revenue from the sale without any requirement that the retailers pay for governmental activity.

#### Minimum Pricing – Legitimate Exercise of Police Power

The police power to regulate business affected with a public interest may extend to control and regulation of prices for commodities if the regulation is reasonably related to a proper legislative purpose, and not arbitrary or discriminatory. *Nebbia v. New York* (1934) 291 U.S. 502. In *Nebbia*, the United States Supreme Court sustained minimum pricing requirements for the milk industry to remedy oversupply and destructive competition which threatened the industry, and health of consumers. Milk is an important industry in many states and due to an oversupply, farmers received less money for the milk than the cost of production. This raised concerns that a prolonged failure to receive a reasonable return would result in a relaxation of health standards for a product which is prone to contamination, and ultimately economic loss to the state. Currently, most states including California still have minimum pricing requirements for milk because many of the characteristics of milk, marketing of milk and related economic conditions that justified the government's intervention in the 1930's remain the same.

Price regulation, however, has its limits and cannot be justified if it primarily promotes a small class of the population, rather than the health and welfare of the general public. See *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.* (1953) 40 Cal.2d 436 (minimum pricing for dry cleaning services did not have any real or substantial relationship to the public health or safety and only enhanced the status of the industry). In this case, the conservation of natural resources, diversion of waste from the landfill, and prevention of litter are all legitimate governmental interests that benefit the general public. These interests are advanced by a reduction in the use of single-use carryout bags in favor of reusable bags. The proposed ordinance would also shift the cost of a recycled paper bag only on consumers that choose to purchase one as oppose to hiding this cost in the price of merchandise which would be paid for by all customers including those who bring reusable bags.

#### Minimum Pricing – Environmental Impact Report

The proposed ordinance is purposefully structured to minimize the likelihood of consumers switching to paper bags by requiring retail establishments to charge a minimum price. According to the Environmental Impact Report (File No. PP09-193) ("EIR"), in jurisdictions where retailers were either charged or required to impose a charge for plastic bags, including Ireland, Denmark, and Washington D.C., fees were effective in discouraging use of single-use plastic bags. The EIR assumes that a comparable fee on recycled paper bags would have a similar deterrent effect. The

December 2, 2010

**Subject: Carryout Bag**

Page 3

minimum price of twenty-five cents (25¢) is proposed but would be deferred for the first two years in favor of a reduced charge of ten cents (10¢). The EIR notes that should consumers be willing to purchase a bag before they transition to reusable bags, there may be a short-term increase in paper bag use until the maximum minimum charge of 25¢ is in effect. The environmental impact from the manufacture of an increased number of paper bags might include increased water use, water pollution, tree removal, and green house gas emission. However, the EIR concludes that a minimum charge of 25¢ should ultimately reduce the consumer's use of such bags to substantially fewer paper bags than are currently used in San Jose. A more detailed discussion of the environmental impacts of single-use carryout bags, including paper bags, is provided in the EIR.

The City Council may adopt, reject, or adopt with amendments the proposed ordinance. It should be noted, however, that adoption with amendments to the minimum charge, to either not have a minimum charge, lower the minimum charge, or defer the implementation of the maximum minimum charge of 25¢, would require a deferral so that these options can be analyzed in the EIR for potential environmental impacts.

RICHARD DOYLE  
City Attorney

By   
Rosa Tsongtaatarii  
Deputy City Attorney

cc: Debra Figone

For questions please contact Rosa Tsongtaatarii, Deputy City Attorney, at 535-1985.